

Plaintiff filed a Complaint on April 10, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for disability insurance benefits ("DIB") for a closed period of disability ("POD"), from August 1, 2001, through June 1, 2004. The parties filed a Joint Stipulation on January 17, 2007, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. On June 12, 2007, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The Court has taken the parties' Joint Stipulation under submission without oral argument.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On December 26, 2001, plaintiff protectively filed an application for a POD and/or DIB, in which he claimed to have been disabled since August 1, 2001. (Administrative Record ("A.R.") 59-61.) After the denial of plaintiff's claims initially and upon reconsideration, plaintiff timely requested a hearing, and on February 25, 2003, plaintiff, who was represented by counsel, testified at a hearing before Administrative Law Judge John W. Belcher ("ALJ"). (A.R. 376-401.) On June 2, 2003, a supplemental hearing was held (A.R. 228-49), and on July 17, 2003, plaintiff's claims were denied by the ALJ. (A.R. 13-18.) Plaintiff timely appealed the ALJ's decision, and the Appeals Council denied plaintiff's request for review. (A.R. 4-7, 10.) On May 20, 2004, plaintiff sought review in the District Court, which remanded the case for further proceedings in a March 30, 2006 Order (the "2006 Order").¹ (A.R. 280-301.)

On May 11, 2006, the Appeals Council effectuated the 2006 Order and remanded the matter to the ALJ for a supplemental hearing, which occurred on August 3, 2006. (A.R. 368-89.) Plaintiff, who was again represented by counsel, testified before the same ALJ. (A.R. 402-16.) At the hearing, plaintiff, through his attorney, requested a closed period of disability from August 1, 2001, through June 1, 2004. (A.R.

¹ In its 2006 Order, the Court ordered the ALJ to: (1) "clarify and develop the record as to whether Plaintiff's back impairment requires fusion surgery, and therefore meets a Listing, through eliciting an additional opinion on this specific issue from a medical expert, an examining doctor, or one of Plaintiff's treating doctors;" and (2) "address each of Plaintiff's claimed limitations in his decision on remand." (A.R. 293, 299.)

1 257.) On January 19, 2007, the ALJ denied plaintiff's claims. (A.R.
2 253-60.)

3
4 **SUMMARY OF ADMINISTRATIVE DECISION**

5
6 The ALJ found that plaintiff met the insured status requirement for
7 a POD and DIB from a time prior to his alleged onset date through
8 January 19, 2007, the date of the ALJ's decision. (A.R. 260.)

9
10 The ALJ found that plaintiff has a "severe" musculoskeletal
11 impairment involving his spine, but he does not have an impairment that
12 meets or equals the criteria of any impairment listed in Appendix 1,
13 Subpart P, Regulations No. 4. (A.R. 257.) Additionally, the ALJ
14 concluded that plaintiff was a "partially credible witness." (A.R.
15 259.)

16
17 Based on plaintiff's residual functional capacity, and the
18 testimony of the vocational expert, the ALJ concluded that plaintiff
19 could not perform any of his past relevant work. (A.R. 259.) However,
20 plaintiff could perform other light jobs, including bench assembler,
21 hand packager/inspector, and cashier II. (*Id.*) Accordingly, the ALJ
22 concluded that plaintiff was not disabled within the meaning of the
23 Social Security Act during the time period at issue. (A.R. 260.)

24
25 **STANDARD OF REVIEW**

26
27 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
28 decision to determine whether it is free from legal error and supported

1 by substantial evidence in the record as a whole. Orn v. Astrue, 495
2 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
3 evidence as a reasonable mind might accept as adequate to support a
4 conclusion.'" *Id.* The "evidence must be more than a mere scintilla but
5 not necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871,
6 873 (9th Cir. 2003)(citation omitted).

7
8 The Court will uphold the Commissioner's conclusion when the
9 evidence is susceptible to more than one rational interpretation. Burch
10 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). While inferences from
11 the record can constitute substantial evidence, only those "reasonably
12 drawn from the record" will suffice. Widmark v. Barnhart, 454 F.3d 1063
13 (9th Cir. 2006)(citation omitted). The Court will not reverse the
14 Commissioner's decision if it is based on harmless error, which exists
15 when it is clear from the record that "the ALJ's error was
16 'inconsequential to the ultimate nondisability determination.'" Robbins
17 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
18 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

20 DISCUSSION

21
22 This case, reduced to its essence, presents two issues: (1)
23 whether the ALJ, in accordance with this Court's 2006 Order, discharged
24 his duty to develop the record; and (2) whether the ALJ properly
25 considered plaintiff's subjective complaints regarding his pain and
26 symptoms, including the side effects of his medication.

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1 I. THE ALJ DISCHARGED HIS DUTY TO DEVELOP THE RECORD FURTHER IN
2 ACCORDANCE WITH THIS COURT'S 2006 ORDER.

3
4 The ALJ in a social security case has an independent duty to fully
5 and fairly develop the record and to assure that the claimant's
6 interests are considered, even when the claimant is represented, as in
7 this case. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.
8 2001)(citations omitted). However, the ALJ's duty to develop the record
9 further is triggered "only when there is ambiguous evidence or when the
10 record is inadequate to allow for proper evaluation of the evidence."
11 Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001)(citations
12 omitted).

13
14 In its 2006 Order, the Court ordered the ALJ to "clarify and
15 develop the record as to whether Plaintiff's back impairment requires
16 fusion surgery, and therefore meets a Listing, through eliciting an
17 additional opinion on this specific issue from a medical expert, an
18 examining doctor, or one of Plaintiff's treating doctors." (A.R. 293.)
19 Plaintiff contends that the ALJ "has yet to fully address the Court's
20 remand order requiring that the record be further developed regarding
21 the need for fusion surgery." (Joint Stipulation ("Joint Stip.") at 9.)
22 For the reasons set forth below, the Court disagrees.

23
24 At the 2006 hearing, by which time plaintiff had resumed working,
25 medical expert Lowell Sparks, M.D., testified that no fusion surgery had
26 been performed on plaintiff since the previous 2003 hearing and opined
27
28

1 that no fusion surgery is necessary.² (A.R. 377.) Dr. Sparks based his
2 opinion on the medical evidence of record, specifically plaintiff's
3 normal nerve conduction velocities as reflected in studies performed in
4 2002, to support his conclusion that no further surgical intervention is
5 required. (A.R. 377.) In addition, he relied on the fact that no
6 physician of record -- other than plaintiff's former treating orthopedic
7 surgeon, on whose opinion plaintiff himself would not rely --
8 recommended that plaintiff undergo fusion surgery.³ (*Id.*) The medical
9 expert further opined that plaintiff does not meet or equal Listings
10 1.04 or 1.08 pertaining to disorders of the spine and soft tissue
11 injuries. (*Id.*) A medical expert's opinion constitutes substantial
12 evidence where, as here, it is not contradicted by the other medical
13 evidence and where the medical expert provides a specific and legitimate
14 rationale to justify his opinion. Morgan v. Apfel, 169 F.3d 595, 600
15 (9th Cir. 1999). Significantly, plaintiff's ability to resume working
16 as of June 1, 2004, provides additional support for the conclusion that
17 fusion surgery was, in fact, not required to facilitate plaintiff's
18 return to work.

19
20 Plaintiff next contends that the ALJ failed to comply with the
21 Court's 2006 Order, because the physician who testified at the hearing
22 regarding plaintiff's need for fusion surgery is an internal medicine
23

24
25 ² Plaintiff underwent a lumbar laminectomy and discectomy at the L3-4
level on November 26, 2001. (A.R. 130-31.)

26 ³ The only physician who recommended a spinal fusion was Michael B.
27 Roach, M.D. Critically, when the ALJ asked plaintiff why he "did not go
28 and get another surgery with Dr. Roach," plaintiff replied, "I don't
trust him I ain't going to let that man touch me again." (A.R.
383.)

1 physician, rather than an orthopedist or neurologist. (Joint Stip. at
2 9.) While generally more weight is given to the opinions of a
3 specialist about medical issues related to his area of specialty than to
4 the opinions of a source who is not a specialist, the opinions of
5 non-examining physicians and medical experts, when they are properly
6 supported, may constitute substantial evidence upon which an ALJ may
7 rely. See, e.g. Morgan, 169 F.3d at 600 (testifying medical expert
8 opinions may serve as substantial evidence when "they are supported by
9 other evidence in the record and are consistent with it"). At the
10 hearing, plaintiff, through his attorney, had the opportunity to object
11 to the medical expert's qualifications, but he chose not to do so.
12 Specifically, when the ALJ asked plaintiff's attorney if he had "any
13 objections to the doctor's qualifications as an expert," plaintiff's
14 attorney replied, "No, Your Honor." (A.R. 374.) As defendant correctly
15 asserts, there was no suggestion, let alone an objection, that the
16 medical expert was not a qualified physician. (Joint Stip. at 13.) "If
17 a party fails to object to an expert's qualifications at the hearing, he
18 waives the right to challenge them." Ischay v. Barnhart, 383 F. Supp.
19 2d 1199, 1222 n.16 (C.D. Cal. 2005).

20
21 Plaintiff further contends that the ALJ failed to comply with the
22 Court's 2006 Order, because the medical expert's testimony, upon which
23 the ALJ relied, was "ambiguous," "internally inconsistent," and
24 "inconsistent with the medical evidence of record." (Joint Stip. at 9-
25 11.) Plaintiff contends that, "in response to one question, the medical
26 expert says that he believes it is possible that Plaintiff may need to
27 lay down to relieve his pain symptoms and in [response to] the following
28 question he states he does not believe that he would need to lay down to

1 relieve those symptoms." (Joint Stip. at 10-11.) Contrary to
2 plaintiff's contention, plaintiff fails to show any true ambiguity or
3 inadequacy in the medical expert's testimony. The medical expert
4 testified that it is "possible" that plaintiff's pain may be alleviated
5 by adopting a reclined posture; at the same time, the medical expert
6 clearly opined that such a position is neither "require[d]" nor
7 "need[ed]" to relieve plaintiff's pain. (A.R. 378-79.) The medical
8 expert's testimony is consistent with the residual functional capacity
9 assessment that plaintiff should be able to "stretch and change
10 positions hourly." (A.R. 378-79.) There is no uncertainty in the
11 record that would have required further record development, and the
12 medical expert's testimony was neither ambiguous nor inadequate to allow
13 for proper evaluation of the evidence.

14
15 Accordingly, the ALJ discharged his duty to further develop the
16 record in accordance with this Court's 2006 Order.

17
18 **II. The ALJ Failed To Provide The Requisite Clear And Convincing**
19 **Reasons For Rejecting Plaintiff's Subjective Pain And Symptom**
20 **Testimony, Including Regarding The Side Effects Of His Medications.**

21
22 Once a disability claimant produces evidence of an underlying
23 physical impairment that is reasonably likely to be the source of his
24 subjective symptom(s), all subjective testimony as to the severity of
25 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
26 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
27 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain
28 and other symptoms are evaluated). Moreover, "unless an ALJ makes a

1 finding of malingering based on affirmative evidence thereof, he or she
2 may only find an applicant not credible by making specific findings as
3 to credibility and stating clear and convincing reasons for each."
4 Robbins, 466 F.3d at 883. Further, the ALJ's credibility findings must
5 be "sufficiently specific" to allow a reviewing court to conclude that
6 the ALJ rejected the claimant's testimony on permissible grounds and did
7 not arbitrarily discredit the claimant's testimony. Moisa, 367 F.3d at
8 885.

9
10 As an initial matter, in its 2006 Order, the Court instructed the
11 ALJ to further consider not only plaintiff's back pain but also his
12 other alleged symptoms, which include, without limitation, alleged pain,
13 stiffness, muscle spasms, numbness in his left leg and foot (and
14 occasionally in his right leg), and pain when walking, which required
15 him to walk hunched over. (See, e.g., A.R. 126, 132, 141, 169, 183,
16 299.) The ALJ failed to do this, notwithstanding the Court's specific
17 order that this be done. The ALJ should have addressed each of
18 plaintiff's claimed limitations and the extent, if any, to which they
19 impacted his ability to work during his alleged POD. The ALJ's failure
20 to do so constitutes error.

21
22 In addition, the ALJ failed to consider the effect of plaintiff's
23 medications on his ability to work during his alleged POD. When an ALJ
24 evaluates a claimant's limitations, he must consider evidence regarding
25 the side effects of medications. Social Security Ruling 96-7p indicates
26 that the "type, dosage, effectiveness, and side effects of any
27 medication the individual takes or has taken to alleviate pain or other
28 symptoms" should be considered in the disability evaluation. See also

20 C.F.R. § 404.1529(c)(3)(iv). The Ninth Circuit has observed that an ALJ must "consider all factors that might have a significant impact on an individual's ability to work." Erickson v. Shalala, 9 F.3d 813, 817 (9th Cir. 1993)(citation omitted). Such factors "may include side effects of medications as well as subjective evidence of pain." Erickson, 9 F.3d at 818. There is substantial evidence of record that plaintiff experienced continuing side effects from his medication. For example, plaintiff was prescribed Neurontin, a drug used for the relief of nerve pain, which caused him to be sleepy and groggy (A.R. 123), and Vicodin, a narcotic pain reliever, which caused him stomach upset and drowsiness (A.R. 214). See PHYSICIAN'S DESK REFERENCE, pp. 510-14, 2462-67 (62d ed. 2008)⁴ In his decision, the ALJ briefly acknowledged plaintiff's testimony and the treatment records regarding the side effects of his medications, but the ALJ did not expressly consider the impact of these side effects on plaintiff's ability to work during the relevant time period. Thus, the ALJ neither properly dismissed the significance of these side effects nor, in his hypotheticals to the vocational expert, did he reference plaintiff's documented side effects from his medications. (A.R. 385-88.) The ALJ was required to consider those side effects in evaluating plaintiff's disability claim.

The ALJ's conclusion that plaintiff was "only a partially credible witness" (A.R. 259) lacks an adequate foundation. In fact, with respect

⁴ Plaintiff was, in fact, taking "about 3 or 4 Vicodin a day" for pain relief on or about March 18, 2002. (A.R. 184.) On or about January 6, 2003, plaintiff was still taking Vicodin, along with Motrin 600, and Flexeril for his pain and other symptoms. (A.R. 160.) Plaintiff was taking Neurontin, on or about May 21, 2002, but was taken off that medication because it made him too sleepy and groggy. (A.R. 123.)

1 to plaintiff's assertions that, during his POD, he spent most of the day
2 in a reclining position and using heat packs (A.R. 381-82), the ALJ
3 conceded that "[plaintiff] probably is telling the truth in what he did
4 do."⁵ (A.R. 259.) Despite this concession, when plaintiff leaned back
5 "apparently due to the use of a heat pack at the hearing," the ALJ
6 characterized plaintiff's behavior as "an embellishment." (A.R. 259.)
7 The ALJ's reliance, at least in part, on this type of "sit and squirm"
8 analysis to support his adverse credibility finding constitutes error.
9 Perminster v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985)(condemning "'sit
10 and squirm' jurisprudence").
11

12 It is undisputed that plaintiff had a back impairment that could
13 have caused the type and severity of pain complained of by plaintiff
14 during his alleged POD, and there is no finding by the ALJ that
15 plaintiff was malingering. Accordingly, the ALJ's reasons for rejecting
16 plaintiff's testimony must be clear, convincing, and based upon
17 substantial evidence in the record. The ALJ must specify, based on
18 substantial evidence of record, which allegations of pain and/or other
19 symptoms he finds to be not credible. Smolen v. Chater, 80 F.3d 1273,
20 1284 (9th Cir. 1996)(ALJ must state specifically which symptom testimony
21 is not credible and what facts in the record led to that conclusion);
22 see Moisa, 367 F.3d at 885 (the ALJ's credibility findings must be
23 "sufficiently specific" to allow a reviewing court to conclude that the
24 ALJ rejected the claimant's testimony on permissible grounds and did not
25

26 ⁵ There apparently is no issue regarding whether plaintiff actually
27 adopted a reclining position to relieve his back pain during his alleged
28 POD. Rather, as the medical expert's testimony makes plain, it is
questionable whether adopting this reclining position was required or
necessary to relieve plaintiff's back pain.

1 arbitrarily discredit the claimant's testimony.) This requirement was
2 not satisfied by the decision in issue.

3
4 **III. Remand Is Required.**

5
6 The decision whether to remand for further proceedings or order an
7 immediate award of benefits is within the district court's discretion.
8 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
9 useful purpose would be served by further administrative proceedings, or
10 where the record has been fully developed, it is appropriate to exercise
11 this discretion to direct an immediate award of benefits. *Id.* at 1179
12 ("the decision of whether to remand for further proceedings turns upon
13 the likely utility of such proceedings"). However, where there are
14 outstanding issues that must be resolved before a determination of
15 disability can be made, and it is not clear from the record that the ALJ
16 would be required to find the claimant disabled if all the evidence were
17 properly evaluated, remand is appropriate. *Id.*

18
19 Here, remand is the appropriate remedy to allow the ALJ the
20 opportunity to remedy the above-mentioned deficiencies and errors. *See,*
21 *e.g.*, Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
22 further proceedings is appropriate if enhancement of the record would be
23 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
24 1989)(remand appropriate to remedy defects in the record).

25
26 Because the ALJ's finding regarding plaintiff's subjective pain
27 complaints must be re-evaluated on remand, the assessment of plaintiff's
28 residual functional capacity may change. Accordingly, additional

1 testimony of a vocational expert may be required on remand. See Embrey
2 v. Bowen, 849 F.2d 418, 422-24 (9th Cir. 1987)(in posing a hypothetical
3 to a vocational expert, the ALJ must fully and accurately reflect all of
4 the claimant's limitations).

5
6 **CONCLUSION**

7
8 Accordingly, for the reasons stated above, IT IS ORDERED that the
9 decision of the Commissioner is REVERSED, and this case is REMANDED for
10 further proceedings consistent with this Memorandum Opinion and Order.

11
12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
13 copies of this Memorandum Opinion and Order and the Judgment on counsel
14 for plaintiff and for defendant.

15
16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

17
18 DATED: August 29, 2008

19 _____/s/
20 MARGARET A. NAGLE
21 UNITED STATES MAGISTRATE JUDGE
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